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766-834—65

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 825

EBER BROS. WINE & LIQUOR CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. B, 1–42) is reported at 337 F. 2d 624.

JURISDICTION

The judgment of the Court of Claims was entered October 16, 1964. The petition for a writ of certiorari was filed January 14, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the court below correctly held that, in light of the particular circumstances involved in this case, the President's veto of a private relief bill

was exercised within the 10 day period prescribed by Article I, Section 7, Cl. 2 of the Constitution.

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 7, Cl. 2 of the Constitution of the United States provides:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

STATEMENT

This suit was brought by petitioner in the Court of Claims for a refund of an income tax overpayment.

It is undisputed that unless H.R. 2717, 86th Congress (a private bill for the relief of petitioner) became law upon the expiration of ten days (Sundays excepted) after presentment to the President, petitioner's claim is barred by the statute of limitations. If H.R. 2717 did become law, petitioner admittedly is entitled to recover.

H.R. 2717 passed the House of Representatives on March 17, 1959 and the Senate on August 27, 1959 (Finding 2; Pet. App. B, 22). The purpose of the bill, as already noted, was to waive the statute of limitations as to petitioner and allow its claim to be considered on the merits (Pet. App. A, 1a; Finding 2; Pet. App. B, 22). On August 31, 1959, in accordance with the customary procedure, the bill was delivered to the White House by a messenger of the House of Representatives.

At that time, President Eisenhower was outside the United States on an official visit to various NATO countries. He had departed on August 26 and did not return until September 7, 1959. Prior to his departure, the President had sent one of his assistants to discuss with Congressional leaders the matter of handling legislation during the President's absence. The Congressional leaders were informed that clerks at the White House had been instructed to stamp on all bills delivered by Congress while the President was away, and on all receipts for such bills, the words "Held for presentation to the President upon his return to the United States." (Finding No. 8; Pet. App. B, 25–26.)

Notwithstanding these instructions, on August 31,

1959, when H.R. 2717 was brought to the White House, the legislative clerk inadvertently failed to stamp on it the words "Held for presentation to the President upon his return to the United States." Instead, he signed the receipt as he normally did when the President was not away. Later that same day, when he became aware of his oversight he attempted to add to the receipt the "Held for presentation * * *" language. This fact was brought to the attention of the House (Finding 9; Pet. App. B, 26–28).

The Journal of the House and the Congressional Record for August 31, 1959 contained the statement that the Committee on House Administration "did on this day present to the President for his approval a bill of the House of the following title: * * * H.R. 2717 * * *." Except for H.R. 2717 and other bills delivered to the White House at the same time, all bills delivered during the President's absence, both prior to and after August 31, 1959, were stamped with the "Held for presentation * * *" language. The delivery of House bills indorsed with this stamp was reflected in the House Journal and Congressional Record with the notation "did * * * deliver to the White House for presentation to the President, for his approval * * *" rather than with the notation, "did * * * present to the President for his approval * * *", used for H.R. 2717 and the other bills delivered at the same time (*ibid.*).

On September 7, 1959, the date of President Eisenhower's return to the United States (Finding 8; Pet. App. B, 25), a stamp was placed on H.R. 2717 stating

that it was presented to the President on that date (Finding 10; Pet. App. B, 28). Seven days later, on September 14, 1959, H.R. 2717 was returned to the House of Representatives by the President with a veto message.[1] It was neither reconsidered by the House nor published as a private law. Congress was in session at all times relevant to these happenings and did not adjourn until the early morning of September 15, 1959 (Finding 11; Pet. App. B, 28).

Petitioner contended in the Court of Claims that the delivery of the bill to the White House on August 31, 1959, started the running of the ten-day period prescribed by the Constitution for the vetoing of a bill, and that the veto on September 14, 1959, was therefore untimely and ineffective. The Court of Claims, in a comprehensive and well reasoned opinion by Judge Davis, rejected petitioner's contention. The court held that the President's veto operated to prevent H.R. 2717 from becoming law and that petitioner's claim was therefore barred. The court stated that "though personal presentation to the President is not mandatory, either the Congress or the President can insist on such delivery. If personal delivery is not demanded by either side, presentation can be made in any agreed manner or in a form established by one party in which the other acquiesces" (Pet. App. B, 8). Applying that principle to the instant case, the Court of Claims concluded that the President was free to decide that bills delivered to the White House during his absence from the United

[1] The President's veto message is set out in 105 Cong. Rec. (Part 15) 19697, 86th Cong., 1st Sess., Sept. 14, 1959.

States would be held for presentation to him upon his return and that since Congress was informed of this procedure and took no action to accelerate presentation or effect personal delivery, it must be taken to have acquiesced in that arrangement.

ARGUMENT

While, as the court below noted (Pet. App. 4), the problem presented by the case "cannot be dismissed as transient" and "will doubtless endure," we do not believe the question is likely to be sufficiently recurrent to warrant consideration by this Court at the present time. Furthermore, whether the particular private bill involved here was validly enacted is in itself a question of trivial significance. In any event, the decision below is clearly correct. Accordingly, we submit that there is no occasion for review by this Court.

1. While this Court has never passed upon the precise issue presented here, its prior decisions under the veto clause of the Constitution (Art. I, Sec. 7, cl. 2) have laid down the basic principles which control this case. "The constitutional provisions have two fundamental purposes; (1) that the President shall have suitable opportunity to consider the bills presented to him, and (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes." *Wright* v. *United States,* 302 U.S. 583, 596 (1938). See, also, *Edwards* v. *United States,* 286 U.S. 482, 486, 493 (1932); *The Pocket Veto Case,* 279 U.S. 655, 677–

678 (1929); *La Abra Silver Mining Co.* v. *United States*, 175 U.S. 423, 454–455 (1899). The first purpose is no less important than the second. "Regard must be had to the fundamental purpose of the constitutional provision to provide appropriate opportunity for the President to consider the bills presented to him. The importance of maintaining that opportunity unimpaired increases as bills multiply." *Edwards* v. *United States*, *supra*, 286 U.S. at 493. "The power thus conferred upon the President cannot be narrowed or cut down by Congress, nor the time within which it is to be exercised lessened, directly or indirectly." *The Pocket Veto Case*, 279 U.S. at 677–678.

The rule adopted by the court below would accommodate the dual objectives of the veto clause, whereas that contended for by petitioner would sacrifice the first (*i.e.*, the President's opportunity to consider bills) to the second (the opportunity of Congress to reconsider and repass them over his veto). Under the Court of Claims' rule, either the President or Congress is free to insist that bills be delivered to the President personally by Congressional courier. In the alternative, the President may require (as in the instant case) that if a bill is delivered to the White House, its "presentation" be delayed until his return to the country. In the latter event, if Congress is unwilling to brook the delay, it may send the bill to the President by its own messenger, thereby assuring that the running of the constitutional ten-day period will be deferred no longer than necessary to make the delivery.

And both the President and Congress are willing to accept a less demanding method of presentation, they may agree to, or acquiesce in, another mutually satisfactory procedure. In that way, the President's opportunity for mature deliberation is preserved without detriment to the Congressional interest in obtaining prompt return of vetoed bills.

Petitioner argues, however, that delivery of the bill to the White House is tantamount to "presentation" and automatically sets in motion the ten-day period for Presidential action. This conclusion is plainly not demanded by the language of the Constitution, which requires that bills be presented to the President, not merely that they be deposited at the White House. Moreover, in any case in which the President is absent from the country for a period of several days, the effect of petitioner's proposal would be to curtail the time available to him for studying the bill, or, indeed, preclude the exercise of the veto altogether. In the instant case, for example, President Eisenhower returned to the United States seven days after the bill was delivered to the White House and, under petitioner's rule, would have had only three days in which to examine the bill before it automatically became law.

It is true, as petitioner points out, that under the long-standing practice prior to 1959, delivery to the White House was treated as presentation to the President. Petitioner argues that the power to alter that practice and to delay presentation during a necessary presidential absence resides solely in Congress.

This contention, we submit, flies in the face of this Court's declaration that the veto power may not be "narrowed or cut down by Congress, nor the time within which it is to be exercised lessened" (*supra*, p. 7). We do not say, of course, that the President may unilaterally modify the presentation procedure without advising Congress and giving it an opportunity to insist upon immediate personal presentation by messenger. In the instant case, however, it is clear that Congress was informed of the method selected by President Eisenhower for handling bills during his absence. A presidential aide discussed the matter with Congressional leaders and told them that incoming bills would be stamped with the language "Held for presentation to the President upon his return to the United States" (Pet. App. 26). Moreover, following the delivery of H.R. 2717 and 12 other House bills to the White House, the delivery of all subsequent bills during the same presidential absence was reported in the House Journal and the Congressional Record with the words "did * * * deliver to the White House for presentation to the President, for his approval * * *." (Pet. App. 29.) Congress made no effort to expedite presentation or to make personal delivery to the President in Europe. In these circumstances, the Court of Claims was plainly warranted in its conclusion that Congress had acquiesced in the procedure instituted by the President. In any event, the question whether in this particular instance Congress acquiesced in the specific method of presentation adopted by President Eisenhower is essentially a fac-

tual question without intrinsic or long-term importance and does not merit review by this Court.

2. Petitioner's reliance upon *Wright* v. *United States*, 302 U.S. 583, is misplaced. In *Wright*, the Court held that the President could return a bill to the Senate, even during a three-day recess of that body, by delivering it to the Secretary of the Senate. As the court below pointed out, however (Pet. App. 14), the Secretary was "the accredited agent of the legislative body" (302 U.S. at 590), authorized to receive such messages from the President, whereas the White House clerk in the the present case plainly had no authorization to accept "presentation" on the President's behalf, but was empowered merely to hold the bill for later presentation upon the President's return. A further significant distinction is the fact that, whereas the President has a ten-day time limit within which to act upon a bill, the Senate is under no such limitation in deciding whether to repass a measure over the President's veto. It is true that the Court noted in *Wright* that the difficulty in returning a bill to one of the two Houses while in recess is no greater "than in presenting a bill to the President by sending it to the White House in his temporary absence" (302 U.S. at 590). That language had reference to the then prevailing practice of treating delivery to the White House as equivalent to presentation, but it in no way implied that the President was without power to modify the practice in order to ensure that the full ten-day period would be available for considering bills. There was no comparable consideration which might have served to justify a re-

quirement that the President return the bill to Congress only when it was actually in session.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Respondent.

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Government's Brief in Opposition achieves the virtue of brevity by foregoing any effort to answer the points raised by the Petition. Indeed, the most significant aspect of the Government's Brief is what it omits.

1. *Respondent Does Not Defend the Rationale Below.* The principal omission in the Brief in Opposition is that it neither explains nor defends the rationale of the decision below. As pointed out in the Petition (pp. 15-17), the decision below did not interpret Article I, Section 7, clause 2 as giving the President unqualified power to require

"personal presentation." Such a construction, the Court noted, would enable the President to stultify the legislative process (Opinion, p. 8). Accordingly, the President's power to insist upon personal presentation, the Court said, required the President (a) to remain "reasonably available" for presentation, and (b) to inform the Congress that personal presentation was indeed required.

The Petition contends that, with those qualifications, the rule as announced below is utterly unworkable (Petition, pp. 23-27). The Government's Brief:

> (1) makes no mention whatever of the requirement that the President be "reasonably available";
>
> (2) makes no effort to meet Petitioner's argument that either of the two qualifications on the "personal presentation" rule make any such rule wholly unworkable; and
>
> (3) does not undertake to defend the unqualified or absolute "personal presentation" rule rejected by the court below.

In short, Respondent asks this Court to leave standing as the sole judicial precedent for the guidance of Presidents and Congresses a decision whose unworkability is not denied, and whose rationale is essentially undefended.

2. *"Informing" the Congress.* The Petition devoted several pages to the proposition that the *kind* of evidence upon which the Court below concluded that Congress was "informed" of President Eisenhower's "new procedure" *in and of itself* demonstrates the unworkability of the Court's rationale (Petition, pp. 25-27). Respondent ignores

the point entirely. It states only its conclusion that Congress was informed (Brief in Opposition, p. 9). Respondent does not attempt to explain how the country is to *know* whether laws have been passed[1] if the determinative question of whether Congress was informed is to be resolved not by reference to any official record, but upon oral testimony, to be given in law suits years later, as to private and confidential conversations between Presidential aides and one or more unidentified "Congressional leaders".[2]

3. *The "Acquiescence" of Congress.* The Government relies heavily on the statement of the Court below that Congress "acquiesced" in the President's "new procedure". As the Petition pointed out, the statement cannot be considered an independent ground of decision since it assumes the very power of the President in dispute (Petition, pp. 28-29). Respondent does not address itself to this argument. It asserts only that the conclusion of "acquiescence" is "essentially * * * factual" and in itself does not merit review (Brief in Opposition, pp. 9-10). As the Petition makes clear (pp. 28-29), the conclusion is wholly without basis in fact. Petitioner does not, however, seek review as to that conclusion itself but only as to the underlying Constitutional power which it assumes (see Petition, pp. 28-29).

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1. See *The Pocket Veto Case*, 279 U. S. 655, 684-85 (1929); *Wright* v. *United States*, 302 U. S. 583, 595 (1938), for this Court's traditional view of the importance of public certainty as to the status of bills.

2. If such testimony is given at all. The former Presidential aide in this case successfully claimed Presidential privilege when asked to divulge the substance of his "discussion" with "Congressional leaders." Finding 8.

4. *The Importance of the Question.* The Government concedes that "the precise issue presented here" has never been passed upon by this Court, and that it "cannot be dismissed as transient" and "will doubtless endure." It nevertheless argues that it "do[es] not believe the question is likely to be *sufficiently recurrent*" to merit consideration by this Court at this time (Brief in Opposition, p. 6) (italics supplied).

The issue presented by this case is what constitutes "presentation" of a bill to the President within the meaning of Article I, Section 7, clause 2. That issue arises often enough when the President is absent from the country, as the twenty-year history of concern by the Department of Justice itself over this very matter indicates (Petition, p. 14 n. 20). Moreover, the Constitutional rule asserted by the Court of Claims is not limited to cases of Presidential absence abroad (Petition, pp. 17-18). Under the rule of the decision below, the question here presented is potentially present as to every bill passed by Congress and not delivered personally to the President—*i.e.*, as to *every* bill.

The Government suggests that the Court should not grant the Petition because the Constitutional issue is presented by a private bill which is itself of "trivial significance". We raise the question of whether any bill enacted by both Houses of Congress can Constitutionally be regarded as of "trivial significance." The fact is that *all* of the cases cited by the Government at pages 6-7 of its Brief, in which this Court has interpreted other aspects of Article I, Section 7, have also involved private bills.

The point is that the significance or insignificance of the bill has nothing to do with whether this Court should grant review: we do not ask this Court to review a decision interpreting the bill, but a decision interpreting a Constitutional provision which is applicable to *all* bills, public and private, important and not-so-important, including appropriations measures, declarations of war, civil rights measures, bills establishing or limiting the jurisdiction of the federal judiciary, and other measures for the general welfare.[3]

It is, perhaps, fortunate that the question arises in the context of a private bill. But the Government's position is, in essence, that this Court should decline to resolve an important Constitutional question which concededly will recur, in the bizarre hope that *next time* the problem will arise as to a measure of great national importance. We respectfully submit that certiorari should be granted to prevent precisely that occurrence.

Conclusion

Respondent's Brief in Opposition fails either to defend the rationale below, to offer any *other* rationale or to meet the grave questions posed by the Petition. We respectfully submit that Respondent has done none of these things because it can do none: because the rationale below is indefensible, because no other rationale can support the deci-

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3. Thus, although *The Pocket Veto Case*, 279 U. S. 655 (1929), also involved a private bill, certiorari was there granted "in view of the *public* importance of the question presented." 279 U. S. at 673 (italics supplied). See also *Wright* v. *United States*, 302 U. S. 583, 586 (1938).

sion below and because the questions posed by the Petition are unanswerable in the context of that decision. We respectfully urge that the Petition for a writ of certiorari be granted.

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